IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN AT JODHPUR.

O R D E R

Suman R. Gupta. Versus State of Rajasthan.

S.B. Criminal Revision Petition No. 295/2005
against the order dated 19-2-2005 passed
by the Additional Judicial Magistrate, Barmer,
in Criminal Case No. 78/2005.

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Date of Order: July 20, 2006

PRESENT

HON'BLE MR. JUSTICE H.R. PANWAR

Mr. K.K. Shah, for the petitioner.
Mr. Ashok Upadhyaya, Public Prosecutor for the State.

BY THE COURT:

This criminal miscellaneous petition under Section 397 read with Section 401 of the Code of Criminal Procedure, 1973 (for short, "the Code" hereinafter) is directed against the order dated 19.2.2005 passed by the Additional Chief Judicial Magistrate, Barmer (for short, "the trial Court" hereinafter) in Criminal Case No. 78/2005, whereby the trial Court took cognizance of the offences under Sections 3 (1) (iii), 3 (1) x) and 3 (2 (vii) of the Scheduled Caste/Scheduled Tribes (Prevention of Atrocities) Act, 1989 (for short" the Act") hereinafter) and issued

process against the petitioner.

I have heard learned counsel for the parties. Carefully gone through the order impugned.

It is contended by the learned counsel for the petitioner that the petitioner is the Assistant Commandant of 173-Battalion of Border Security Force and, therefore, there is a dual jurisdiction as per the Criminal Courts and Border Security Force Courts (Adjustment of Jurisdiction) Rules, 1969 (for short, "the Rules, 1969" hereinafter) and where there are dual jurisdiction and the person is subject to B.S.F., the choice is with the Commanding Officer of the B.S.F. to decide whether the petitioner should be tried by the Additional Chief Judicial Magistrate or he should be tried before the Court Martial under the provisions of the Border Security Act, 1968 (for short, "the BSF Act" hereinafter). Learned counsel for the petitioner has relied on a decision of this Court in Ran Singh Dudee Vs. Union of India & ors., RLW 1998 (2) Raj. 1002.

Rule 3 of the Rules, 1969 provides that where a person subject to the BSF Act, is brought before a Magistrate and charged with an offence for which he is liable to be tried by the Border Security Force Court, such a Magistrate shall not proceed to try such persons or to inquire with a view to his commitment for trial by the Court of Sessions or the High Court for any offence triable by such Court, unless (a) he is of opinion,

for reasons to be recorded in writing that he should so proceed without being moved thereto by the Competent Authority; or (b) he is moved thereto by such authority. Rule 4 of the Rules 1969 pertains to notice by the Magistrate and provides that before proceeding under clause (a) of rule 3, the Magistrate shall give written notice to the commandant of the accused and until the expiry of a period of (i) three weeks, in the case of a notice given to a commandant in command of a unit or department located in any of the following areas, that is to say (a) State of Nagaland; (b) Mizo Hill, Garo Hill, Khasi and Jaintia Hill and North Cachar Hill Districts of Assam, or (ii) ten days in the case of a notice given to any other commandant in command of a unit or detachment located elsewhere in India, from the date of the service of such notice, he shall not (a) a convict or acquit the accused under Section 243 or Section 245 or Section 247 or Section 248 of the Code of Criminal Procedure, 1898 (5 of 1898) or hear him in his defence under Section 244 of the said Code; or (b) frame in writing a charge against the accused under Section 254 of the said Code; or (c) make an order committing the accused for trial by the High Court or the Court of Sessions under Section 213 of the said Code; or (d) transfer the case for inquiry or trial under Section 192 of the said Code.

In the instant case, according to the learned counsel for the petitioner, no notice, as envisaged under rule 4 of the

Rules, 1969 has ever been given in writing to the Commandant of the Command in which the petitioner is serving.

Sections 37 to 41 of the BSF Act pertains to Offences relating to Security Force Court. So far as offences enumerated under Sections 37, 38, 39 and 40 of the BSF Act are concerned, most of them relate to the offences within the force; however Section 41 of the BSF Act deals with miscellaneous offence. Section 46 of the BSF Act deals with civil offences, which reads as under:-

> "46. Civil Offences.- Subject to the provisions of Section 47, any person subject to this Act who at any place in, or beyond, India commits any civil offence shall be deemed to be guilty of an offence against this Act an, if charged therewith under this section shall be li8able to be tried by a Security Force Court and, on conviction, be punishable as follows, that is to say,-
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> (a) if the offence is one which would be punishable under any law in force in India with death, he shall be liable to suffer any punishment, assigned for the offence, by the aforesaid law and such less punishment as is in this Court mentioned; and
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> (b) in any other case, he shall be liable to suffer any punishment assigned for the offence by the law in force in India, or imprisonment for a term which may extend to seven years, or such less punishment as is in this Act mentioned."

Section 47 of the BSF Act deals with the civil offences not triable by a Security Force Court, which reads as under:-

> "47. Civil offences not triable by a Security Force

> Court.- A person subject to this Act who commits an offence of murder or of culpable homicide not amounting to murder against, or of rape in relation to, a person not subject of this Act shall not be deemed to be guilty of an offence against this Act and shall not be tried by a Security Force Court, unless he commits any of the said offences,-
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> (a) while on active duty; or
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> (b) at any place outside India; or
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> (c) at any place specified by the Central Government by notification in this behalf."

Thus, the exceptions to the offences to be tried by the Security Force Court have been enumerated under Section 47 of the BSF Act with certain exceptions. In the instant case, there is no offence of murder or culpable homicide not amount to murder or rape against the person and, therefore, the offences alleged to have been committed by the petitioner would not fall within the purview of Section 47 of the BSF Act and, thus, the offences in question are triable by the Security Force Court by a Court Martial under the BSF Act.

Section 80 of the BSF Act deals with Choice between criminal court and a Security Force Court and provides that when a criminal court and a Security Force Court have each jurisdiction in respect of an offence, it shall be in the discretion of the Director-General, or the Inspector-General or the Deputy Inspector-General within whose command the accused person is

serving or such other officer as may be prescribed, to decide before which court the proceedings shall be instituted and, if that officer decides that they shall be instituted before a Security Force Court, to direct that the accused person shall be detained in Force custody.

From a bare reading of Section 80 of the BSF Act, it is clear that the choice between criminal court and a Security Force Court shall be in the discretion of the Director-General, Inspector-General or the Deputy Inspector-General, within whose command, the accused is serving, or such officer as may be prescribed to decide before which Court the proceedings shall be instituted, for which the enabling provision has been provided in the Rules of 1969, more particularly rules 3 and 4 of the Rules, 1969, as noticed above.

In the instant case, no notice to the Commandant of the accused—petitioner in writing has been given and, therefore, in absence of a notice, the discretion vests with the Director-General, Inspector-General or the Deputy Inspector-General or any other Officer within whose local command, the accused-petitioner is serving, could not be exercised.

Similar controversy came to be considered by this Court in Ran Singh Dudee Vs. Union of India & ors. (supra), wherein a person subject to the Army Act and the Army Rules was sought to be tried by the Judicial Magistrate No.3, Jodhpur

for the offences under Sections 354 and 452 IPC. Considering the provisions of Section 475 of the Code, as also Sections 70, 125 and 126 of the Army Act,1950 and rules 49 and 180 of the Army Rules, 1954, this Court held that the choice lies initially with the officer commanding the Army, Army Corps, division of independent brigade in which the accused person is serving to decide whether an accused be tried with Court Martial or he be handed over for trial to the Criminal Court and where a Criminal Court having jurisdiction considers that the accused be tried before itself, it may, in writing call upon the officer referred to in Section 125 of the Army Act to hand over the accused to it for trial.

Section 475 of the Code reads as under:-

> "475. Delivery to commanding officers of persons liable to be tried by court-martial.- (1) The Central Government may make rules consistent with this Code, and the Army Act, 1950 (46 of 1950), the Navy Act, 1958 (62 of 1957) and the Air Force Act, 1950 (45 of 1950), and any other law relating to the Armed Forces of the Union, for the time being in force, as the cases in which persons subject to military, naval or air force law or such other law, shall be tried by a Court to which this Code applies or by a court-martial; and when any person is brought before a Magistrate and charged with an offence for which he is liable to be tried either by a Court to which this Code applies or by a court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him together with a statement of the offence of which he is accused to the commanding officer of the unit to which he belongs, or to the commanding officers of the nearest military, naval or air force station, as the case may be, for the purpose of being tried by a court-martial."

Thus, from a bare reading of Section 475 of the Code and rule 3 of the Criminal Courts and Court Martial (Adjustment of Jurisdiction) Rules, 1978, which is para-materia to the Rules of 1969 vis-a-vis Section 475 of the Code, for a trial of a BSF personnel, before committing the BSF personnel to the Sessions Court or the High Court, the Magistrate has to address the Commanding Officer concerned under rules 3 and 4 of the Rules 1969 giving him a choice and to exercise the discretion as to Magistrate to proceed against the person in civil court or he be tried by the BSF Court. However, if the Magistrate decides to exercise the discretion to proceed against the accused person subject to BSF Act in a civil court for trying the offender before the civil court, recording the reason is mandatory; whereas in the instant case, neither the notice, as envisaged under rules 3 and 4 of the Rules 1969 was given, nor the provisions of Section 80 of the BSF Act have been complied with and, therefore, the impugned order of the trial Court for trying the accused-petitioner, taking cognizance of the offence and issuing process against the accused-petitioner, is erroneous and liable to be set aside.

In the result, the criminal revision petition is allowed; the impugned order dated 19.2.2005 passed by the trial Court in Criminal Case No. 78/2005 is set aside and the matter is

remanded to the trial Court to proceed in accordance with the provisions of the BSF Act, as noticed above, as also in accordance with the Rules, 1969. Stay petition stands disposed of.

(H.R. PANWAR), J.

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